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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SANTA VENETIA CENTER FOR THE ARTS AND HUMANITIES, Plaintiff and Appellant, v. SAN RAFAEL UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	A108849 (Marin County Super. Ct. No. 824887)

This is an appeal prosecuted by various persons (the Artists), taken after an August 25, 2004 order denying various claims, but appears to be an attempt to avoid the effects of a February 17, 2004 judgment that the Santa Venetia Center for the Arts and Humanities, Inc. (Art Center) take nothing by its complaint against the San Rafael Unified School District (School District), and that the School District be awarded fee simple, quiet title to the real property located at 1565 Vendola Drive, San Rafael, California. We have found nothing of merit in the appeal. Even more, we have concluded that the appeal is untimely as to most of the matters designated in the notice of appeal, that the Artists lack standing to prosecute an appeal from most of those matters and that the appeal is so procedurally defective as to suggest contempt for the judicial process.

The School District has filed a responsive brief pointing out that the Artists' opening brief raises no issues relating to the August 25, 2004 order and fails to cite any

authority to support the arguments it does make. The School District also points out that the appellate record, designated by the Artists, does not include material supporting many of the Artists' factual assertions. It contends that the appeal is frivolous, and asks that sanctions be imposed on the Artists and their attorney. We notified the parties that we were considering imposing sanctions, inviting them to submit additional briefing on the question of whether sanctions should be imposed, and directing them to address that question at oral argument before this court.

BACKGROUND

From what we are able to glean from the appellate record,[1] the Art Center contracted to purchase 4.74 acres of real property from the School District, for $900,000 plus certain services. The Art Center made a down payment of $90,000, and executed a promissory note obligating it to pay the balance of the purchase price, plus interest, over a 20-year period, at which point all the principal and all the unpaid interest would become due. The promissory note provides, further, that any default by the Art Center that remained uncured for 10 days allowed the School District to declare the entire unpaid principal and accrued but unpaid interest to be immediately due and payable.

The School District apparently initiated foreclosure proceedings in 2002. On September 24, 2002, the day before the scheduled foreclosure sale, the Art Center filed a complaint for quiet title and specific performance against defendants. The Art Center declared bankruptcy on that same date. The School District filed a cross-complaint to quiet title to the property in its name. The Art Center removed the matter to the United States Bankruptcy Court. On October 27, 2003, the bankruptcy court authorized a settlement agreement between the Art Center and the bankruptcy trustee, Charles E. Sims, under which the School District paid the Art Center $40,000 in exchange for a quitclaim deed and a stipulated judgment in the state court action rescinding the purchase agreement. In the meantime, on October 16, 2003, the superior court granted Mr. Sims's

[1] In setting forth the background, we rely, in large part, on the allegations of the Art Center's complaint and first amended complaint, and on matters either cited or alluded to by the superior court in stating its reasons for finding no jurisdiction to hear the Artists' claims of possession.

motion to substitute in as party plaintiff and cross-defendant in the superior court proceedings. On February 17, 2004, consistent with the settlement authorized by the bankruptcy court, and on the stipulation of the bankruptcy trustee and the School District, the superior court entered judgment quieting title to the property in the School District, rescinding the purchase agreement, and ordering that the Art Center take nothing by its complaint of September 24, 2002. On March 5, 2004, the court issued a postjudgment writ of execution directing the sheriff to remove any occupants and any personal property from the premises.

The Artists then apparently filed "Claims of Right to Possession" in the superior court, asserting that they were entitled to remain on the property either under "an oral rental agreement with the landlord" or as the purchasers of a life estate in the property. At the hearing on the matter, held August 3, 2004, counsel for the bankruptcy trustee appeared, explaining that the rights of the Artists were being litigated in the bankruptcy court, that Chris Egan—one of the Artists—was managing the case in those proceedings on behalf of the Art Center, and that Mr. Egan had listed the individual artists as persons who should receive notice of those proceedings, although they were not listed as creditors. Counsel asserted, further, that the Artists had in fact received notice of all the proceedings and that they at some point had filed a claim in those proceedings, apparently seeking damages for exposure to mold and/or asbestos. In any event, counsel explained, the bankruptcy court had exclusive jurisdiction over the property of the bankruptcy estate. Counsel for the Artists also appeared, complaining that irrespective of anything Mr. Egan was doing, the other individual artists never had been represented in any forum.

On August 25, 2004, the superior court ruled that it lacked jurisdiction to consider the merits of the Artists' claims. Its order referenced two documents filed by the Artists: (1) an ex parte application to stay the state court proceedings, and (2) an opposition to objection to claims filed in the bankruptcy court. The court ruled that having asserted in the past that the bankruptcy court had exclusive jurisdiction over their claims, the Artists were judicially estopped from taking an inconsistent position and arguing that the state

court should adjudicate their claims after the bankruptcy court had denied them any relief. The court also ruled it lacked jurisdiction over those claims as a matter of law, citing *Levy v. Cohen* (1977) 19 Cal.3d 165 and *Miller v. R.K.A. Management Corp.* (1979) 99 Cal.App.3d 460 (*Miller*). On December 14, 2004, the court ordered the sheriff to proceed with the writ of possession.

One week later, on December 21, the Artists filed their notice of appeal, purporting to appeal from the February 17, 2004 judgment, the August 25, 2004 denial of their claims, the December 14, 2004 order requiring the sheriff to proceed with the writ of possession and from other orders dated March 5, 2004 and May 1, 2003. Counsel later filed a case information statement asserting that the appeal was from the orders of August 25, 2004, and December 14, 2004, and from an oral December 15, 2004 order denying a stay.

DISCUSSION

Timeliness of Appeals from Judgment and Other Orders

California Rules of Court, rule 2,[2] provides that the time for taking an appeal is 60 days after the superior court mails notice of entry of judgment to the party filing the notice of appeal, 60 days after the party has been served with the judgment or notice of entry of judgment or 180 days after entry of judgment, whichever is the earliest. "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. [Citation.]" (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) The judgment was entered on February 17, 2004. The Artists filed their notice of appeal on December 21, 2004, more than 180 days later. The appeal is untimely. The same is true of the unspecified orders of March 16, 2004, and October 25, 2004. As we lack jurisdiction to consider the appeals from these orders, they will be dismissed.

The record includes a proof of service executed by the clerk of the court certifying that notice of the August 25, 2004 ruling was served on the Artists' attorney, John Harrington Macconaghy, on August 26, 2004. The appeal from that ruling therefore also

[2] All references to rules are to the California Rules of Court.

is untimely.[3] While the Artists' case information statement asserts that an appeal was taken from an oral order made on December 15, 2004, that order is not mentioned in the notice of appeal. No appeal, therefore, in fact has been taken from it. In sum, the only timely appeal is the appeal from the December 14, 2004 postjudgment order to proceed with the writ of possession.

Other Procedural Issues

The Artists frame the appellate issue as: "Whether a stipulated Judgment against Plaintiff in a civil matter is fatally flawed, unconscionable, and void where the Plaintiff-buyer, a not-for-profit group of artists, takes nothing of the property it has been purchasing and living on for years, and the School District-seller, takes the entire property, where the Artists are represented only by an appointed bankruptcy trustee, and are not represented by counsel at all during the settlement?" The Artists' appellate briefs complain that they were not permitted to fight for and keep the property, arguing that the settlement between the bankruptcy trustee and the School District was unfair to them.

There are at least two serious procedural problems with this argument. First, as discussed above, the Artists have not filed a timely appeal from the judgment. Second, as a general rule, only parties of record may appeal. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736.) A party of record is a person named as a party to the proceedings or one who takes appropriate steps to become a party of record in the proceedings. (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 539.) The Artists, while undoubtedly affected by the judgment, and while apparently having notice of it, were not parties to the proceedings that culminated in the judgment, and have not produced any document suggesting that they attempted to become parties to those proceedings. Furthermore, upon the filing of a petition for bankruptcy, all of the debtor's assets, including any interest in a cause of action, pass to the trustee in bankruptcy, which means, among other things, that the trustee is the proper party to bring the appeal, not the bankrupt corporation. (*People v. Kings Point Corp.* (1986) 188 Cal.App.3d 544, 548-549.)

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[4] In her civil case information statement, the Artists' new attorney asserts that notice was never mailed or served. The record contradicts that assertion.

Neither the Artists nor the Art Center, therefore, have standing to appeal from the judgment.

The Artists were parties to their postjudgment claims for possession, and therefore have standing to appeal from the order denying those claims for lack of subject matter jurisdiction, but again, there are problems—even aside from the timeliness of the appeal. As the School District correctly points out, the Artists' appellate brief does not challenge the court's finding that it lacked subject matter jurisdiction. Issues not raised in appellant's brief are deemed waived and abandoned. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811.)[4]

The Artists were not parties to the postjudgment order to proceed with the writ of possession, and therefore lack standing to appeal from it. In any event, their briefs do not address the validity or merits of that order.

Appellate Delays and Defects in Opening Brief

The Artists filed their notice of appeal on December 21, 2004, designating eight documents to be included in the clerk's transcript: the notice of appeal, the notice designating the record on appeal, the February 17, 2004 judgment and five postjudgment orders or rulings, including the August 25, 2004 ruling that the superior court lacked jurisdiction to consider the Artists' claims and the December 14 order to proceed with the writ of possession. The appellate record was filed on March 2, 2005. On April 5, pursuant to rule 17(a)(1), the Artists were notified that their opening brief had to be filed

[4] Although we have no reason to review the merits of the superior court's ruling, we note that the court in *Miller*, *supra*, 99 Cal.App.3d 460, one of the cases cited by the superior court, held that jurisdiction in the state court over a claim associated with a debtor's property is "clearly precluded by express federal statute and case authority." (*Id.* at p. 465.) "So that the debtor's estate may be properly administered and the rights of creditors safeguarded, state courts may not intrude on the bankruptcy court's exclusive jurisdiction." (*Id.* at p. 466.) The Artists' claims—that they had an interest in the debtor's property, or were in some way the debtor's creditors, should have been adjudicated in the bankruptcy proceedings. If the bankruptcy court erred in failing to adjudicate those claims, the Artists' remedy lies there and not in a collateral attack through the state court.

within 15 days. The parties stipulated that the time for the Artists to file their opening brief might be extended to May 20, 2005. On May 20, the Artists' attorney sought an extension to May 27, asserting, among other things, that the issues on appeal "are extremely complex." This court granted the requested extension. On May 27, counsel requested an additional two-day extension, again asserting that the appellate issues were complex, and further asserting that Mr. Egan was terminally ill and had been unable to assist counsel. The request was granted. Another two-day extension was requested and granted, extending the time for filing the opening brief to June 3, 2005. On June 3, counsel moved to augment the record with several prejudgment documents, and requested an additional extension of time in which to file the opening brief. The motion and request were granted. Counsel was given until June 24, 2005, in which to file the brief. Counsel sought and received five additional extensions of time to file her opening brief.

The opening brief finally was filed on August 5, 2005. It includes a three-page "Statement of the Case" that refers primarily to the superior court's register of actions. Most of the matters listed in the register of actions are not in the clerk's transcript. The opening brief contains a two-page "Statement of Facts" that refers, mostly, to the allegations of the Art Center's first amended complaint. The brief includes two pages of "Argument," asserting that the settlement agreement between the School District and the Art Center was unconscionable and was entered into without "Plaintiffs' " agreement—apparently confusing the Artists with the true plaintiff—the Art Center. The brief cites no legal authority whatsoever.

It is immediately apparent that despite counsel's claims that the issues are complex and despite the numerous extensions of time given to her to file the brief, the opening brief makes no attempt to address an issue of any complexity or to mount a difficult or complicated argument.

It also is true that the opening brief fails to make any arguments relating to the proceedings to which the Artists were parties, and also fails to provide any support for the arguments it does make. Rule 14 requires briefs to support each point by argument, and,

if possible, by citation of authority, and to support any reference to a matter in the record by a citation to the record. (Rule 14(a)(1)(B) & (C).) Rule 14 also requires the appellant's opening brief to "[s]tate that the judgment appealed from is final, or explain why the order appealed from is appealable; and [¶] . . . provide a summary of the significant facts limited to matters in the record." (Rule 14(a)(2)(B) & (C).) The Artists' brief does not state whether the judgment is final or explain why the several orders listed in its notice of appeal are appealable. Its citation to the register of actions is no substitute for including in the appellate record the referenced documents filed in the superior court and transcripts of the relevant proceedings. The allegations of a complaint are not facts, at least not where, as here, no party has verified the complaint.

The party prosecuting an appeal has the duty to provide the reviewing court with an adequate record on appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498.) " ' "A judgment or order of the [trial] court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . ." [Citation.]' [Citation.] It is the appellant's affirmative duty to show error by an adequate record. [Citation.] 'A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.' [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) Conclusory allegations such as those made by the Artists "are wholly inadequate to tender a basis for relief on appeal. [Citations.]" (*Ibid.*) "Appellant's burden also includes the obligation to present *argument and legal authority* on *each point* raised. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1996) ¶ 8.17.1, p. 8-5, rev. #1, 2005.) A brief is inadequate when it is little more than "a discussion of the facts

of the case with no discussion, and apparently no understanding, of the purposes of appellate review nor the function and limitations of an appellate court." (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.)

In sum, the artists lack standing to contest most of the matters they cite, their appeal is untimely as to anything of which they have standing to complain, their briefs are defective, their arguments lack merit and their attorney misrepresented the complexity of the issues, apparently as a means of delaying our consideration of the merits of the Artists' arguments.

SANCTIONS

Code of Civil Procedure section 907 provides that "[w]hen it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." Rule 27(e) allows the court to impose sanctions on a party or an attorney for the taking of a frivolous appeal or appealing solely to cause delay. An appeal is frivolous "only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The first standard is tested subjectively. The focus is on the good faith of appellant and counsel. The second is tested objectively. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* §§ 11:102 to 11:103, p. 11-34, rev. 2005 #1.) "While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together 'with one providing evidence of the others. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.' [Citations.]" (*Id.* at ¶ 11:104, p. 11-34.)

There is evidence from which it could be inferred that the Artists and their attorney are prosecuting this appeal in an attempt to delay the School District from obtaining possession of the property. The record does not disclose whether the appeal has resulted in an actual delay. It does, however, indicate that there were numerous

difficulties and delays in the proceedings prior to the appeal as the Art Center, and later the Artists, attempted to avoid turning the property over to the School District. We need not, however, decide whether the subjective standard has been met, as we conclude that any reasonable attorney would agree that the appeal is frivolous under the objective standard.

An appeal is not frivolous simply because it lacks merit. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.) "Sanctions are to be 'used most sparingly to deter only the most egregious conduct.' [Citation.] Further, '[a]n appeal, though unsuccessful, should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law. [Citation.]' " (*Ibid.*) Sanctions are, however, appropriate where there are no unique issues, no facts that are not amenable to easy analysis in terms of existing law, and no reasoned argument by the appealing party for the extension of existing law. (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1081.) The Artists have not presented any unique issues, facts not amenable to easy analysis or any reasoned argument for extending existing law to the particular situation at hand. Even ignoring all the defects discussed above, it is unimaginable that a party or its attorney, without citing any authority, would believe that a case could be won simply by arguing that something unfair had occurred below.

The case is so utterly without merit that it is difficult to believe that the appellate brief was written by an attorney. The same can be said for the Artists' response to our sanctions letter. The Artists insist that they have not filed a frivolous appeal because they are only trying to vindicate their rights. That is not the test for whether an appeal is frivolous. The Artists assert that the appeal was not taken to cause delay, and claim they have not in fact caused any delay, ignoring the entire procedural history of this case, and also ignoring that the appeal itself causes delay, and that their many requests for extensions delayed consideration of the appellate issues. The Artists deny that their briefs are defective. Finally, the Artists assert that the School District's request for

monetary sanctions should be stricken because the School District failed to file a declaration within the time limits of rule 27(e)(2), which requires a party moving for sanctions to file a supporting declaration no later than 10 days after the appellant's reply brief is due. This rule has no application where the reviewing court is considering imposing sanctions on its own motion. In such a case, the court provides notice to the parties—as we have done. (Rule 27(e)(3).)[5]

Whether sanctions should be imposed in an individual case involves the resolution of competing policy interests: the policy against deterring attorneys from the vigorous representation of their clients, and the policy that an attorney, as an officer of the court, not pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. (*Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 994-995.) In *Kurokawa*, sanctions were imposed on an attorney when the attorney "asserted little, if any, evidence or legal support for any [of the client's] causes of action. The briefs state the record loosely, cite strained authorities, and discuss legal principles in a vacuum." (*Id.* at p. 996.) In *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, sanctions were imposed when the appeal was totally and completely without merit and the attorneys' "utter failure to discuss the most pertinent legal authority [citation] and their preparation of a grossly inadequate record," convinced the appellate court that "they knew as much, and subjectively prosecuted the appeal for an improper purpose." (*Id.* at p. 32.) As the court noted in *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103: "An attorney in a civil case is not a hired gun required to carry out every direction given by the client. [Citation.] As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. [Citation.] Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the

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[5] It is, however, true that the School District requested sanctions in its responsive brief. The request was procedurally improper. "A party seeking sanctions on appeal must file a separate motion for sanctions that complies with the requirements of . . . rule 41." *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.)

attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client." (See also rule 3-200(A) & (B), Rules of Professional Conduct.)

For all of the above reasons, we conclude that monetary sanctions are appropriate. In determining the amount of sanctions to impose, courts may consider the amount of respondent's attorney fees on appeal, the amount of the judgment against the appellant, the degree of objective frivolousness and delay and the need for discouragement of like conduct in the future. (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 342; *Pierotti v. Torian, supra,* 81 Cal.App.4th at pp. 33-34.) Counsel for the School District claims attorney fees of $11,000 in addition to costs of $873.95. That amount is not unreasonable, except that a significant portion of the fees would have been avoided had the School District sought an early dismissal to the appeal.

DISPOSITION[6]

The appeal from the judgment is dismissed as untimely. The postjudgment orders are affirmed. Respondent School District is awarded its costs on appeal. The Artists and attorney Claire Leary shall each pay $1,000 to the School District as sanctions, to be recovered by the School District as costs.

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STEIN, J.

We concur:

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MARCHIANO, P. J.

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MARGULIES, J.

[6] Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), the clerk of this court is directed to transmit a copy of this opinion to the State Bar of California.